Supreme Court, U.S.
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No. 07-529

IN THE

United States Supreme Court

RANDOLPH GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, after *United States v. Booker*, 543 U.S. 220 (2005), a court of appeals must evaluate a district court's decision to adhere to a previously imposed sentence for the substantive reasonableness of the undisturbed sentence, not merely the district court's understanding of the scope of its discretion under *Booker*.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Randolph George, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The most recent opinion of the court of appeals was not selected for publication in the Federal Reporter, but is available at 226 Fed. Appx. 771 (No. 06-10275) and is reproduced in the Appendix (at 1a) to this petition. The 2005 opinion of the court of appeals is reported at 420 F.3d 991 and is reproduced in the Appendix (at 5a).

JURISDICTION

The Ninth Circuit denied Mr. George's timely appeal on March 30, 2007, and denied his petition for rehearing en banc on July 2, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions involved are contained in the Appendix at 25a.

STATEMENT

This case involves a criminal conviction for filing false tax returns, the sentence imposed as a result of this conviction, and the Ninth Circuit's failure to review the substantive reasonableness of the sentence after it was reimposed in the wake of this Court's decision in *United States v. Booker*.

On November 13, 2002, Randolph George was convicted by a jury of two counts of filing false federal tax returns for 1991 and 1992, and one count of failure to file for 1993. During a subsequent hearing on tax loss, the district court determined that the government could establish relevant conduct by a preponderance for the purposes of sentencing. The parties then entered into a written stipulation regarding tax loss, reserving Mr. George's right to appeal from the district court's relevant conduct rulings ("underlying rulings"), and conditioning the validity and effect of the stipulation on the affirmance of the district court's underlying rulings by the Ninth Circuit. Pet. App. 24a.

After denying a motion for downward departure for extraordinary family circumstances, and based on the parties' stipulation, the district court applied the then-mandatory U.S. Sentencing Guidelines and sentenced Mr. George to fifteen months' imprisonment, a $20,000 fine, a $125 special assessment, and $70,000 in restitution. Pet. App. 21a-22a. Mr. George appealed the conviction and sentence to the Ninth Circuit challenging, *inter alia*, the district court's underlying rulings.

While Mr. George's appeal was pending, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), striking down Washington State's sentencing law, and *United States v. Booker*, 543 U.S. 220 (2005), invalidating the "mandatory" portions of the U.S. Sentencing Guidelines. In the wake of these decisions, the Ninth Circuit decided *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*), which provided for a limited remand where "it is not possible to reliably determine from the record

whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory." *Ameline*, 409 F.3d at 1084.

On August 23, 2005, the Ninth Circuit affirmed Mr. George's conviction, finding no Sixth Amendment violation in light of the parties' stipulation, but remanded to the district court to review the sentence in accordance with *Ameline*. *United States v. George*, 420 F.3d 991, 1001-02 (9th Cir. 2006). The Ninth Circuit did not address the validity of the district court's underlying rulings. *Id.* Mr. George's petition for rehearing requesting consideration of the conditional nature of the stipulation was denied on January 16, 2006, without discussion.

At the hearing on remand on April 12, 2006, Mr. George argued that, because the Ninth Circuit failed to address the district court's underlying rulings, the conditional stipulation could not constitute an admission as to tax loss and, as such, there was nothing upon which to base his 15- month sentence. Relying on the law of the case doctrine, and finding that the Ninth Circuit affirmed its underlying rulings, the district court refused to substantively address Mr. George's arguments. The district court next addressed the factors under 18 U.S.C. § 3553(a), in particular, Mr. George's family circumstances. Though acknowledging the gravity of George's family circumstances, the district court considered a factor it had not previously considered in the original sentencing – Mr. George's purportedly false testimony at trial – to impose the same sentence originally imposed. Mr. George timely appealed.

On December 18, 2006, the Ninth Circuit issued an opinion in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), holding that its review following an *Ameline* remand is limited to "[w]hether the district judge properly understood the full scope of [her] discretion in a post-*Booker* world." *Id.* 470 F.3d at 1297. On March 9, 2007, the Defendant-Appellant in *Combs* filed a Petition for Panel Rehearing or Rehearing *En Banc*.

On March 30, 2007, in reliance on the *Combs* decision, the Ninth Circuit affirmed the district court's determination to retain the pre-*Booker* sentence imposed on Mr. George. Pet. App. 1a. On July 2, 2007, the Ninth Circuit denied Mr. George's Petition for Panel Rehearing or Rehearing *En Banc*. On July 9, 2007, the Ninth Circuit denied the Petition for Panel Rehearing or Rehearing *En Banc* in the *Combs* case.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit created an intercircuit split and contravened this Court's clear precedent when it held that it would review a district court's decision to retain a sentence originally imposed pre-*Booker* only to ensure that the district court understood the scope of its discretion post-*Booker*.

This Court made clear in *Booker* that federal criminal sentences were to be reviewed by the appellate courts for reasonableness, 543 U.S. at 260-61, and that this reasonableness standard was to be applied in all cases that were pending on direct review at the time *Booker* was decided, *id.* at 268. A majority of the circuit courts that have considered the is-

sue has held that such reasonableness review requires that, if a district court elects on post-*Booker* remand to adhere to the originally imposed sentence, the appellate court will review the sentence for substantive reasonableness. In contrast, the Ninth Circuit's opinion below, applying its decision in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), defined *Booker*'s prescribed reasonableness review so narrowly as to render it devoid of any real meaning, thus denying defendants like Mr. George any opportunity for meaningful appellate review of their sentences.

In addition, the Ninth Circuit's purported "reasonableness" review explicitly sets up different schemes of appellate review for defendants who challenged the reasonableness of their sentences during their first appeal and those who did not. *Booker* does not make this distinction, nor does the majority of the circuit courts that has addressed the question of limited remands for compliance with *Booker*. Because of the intercircuit conflicts created by the Ninth Circuit's decision below—not to mention conflicts with this Court's precedent—certiorari is warranted in this case.

I. THE DECISION BELOW CONFLICTS WITH THE MAJORITY OF FEDERAL COURTS OF APPEALS TO HAVE CONSIDERED POST-*BOOKER* REASONABLENESS REVIEW.

The Ninth Circuit's decision below (which followed its earlier decision in *Combs*) is out of line with the majority of the circuits to have considered the scope of reasonableness review post-*Booker*. Indeed, the Second Circuit, considering the current

state of circuit precedent, singled out the Ninth Circuit's decision in *Combs* as out of step with the majority of circuit court decisions to consider the issue. *United States v. Williams*, 475 F.3d 468 (2d Cir. 2007) (applying full substantive reasonableness review). The Seventh Circuit has joined the Second Circuit in applying a reasonableness review that inquires into both the procedure whereby the original sentence was retained and the substance of the reimposed sentence. *See United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Williams*, 425 F.3d 478 (7th Cir. 2005). *See also United States v. Robinson*, --- F.3d ---, 2007 WL 2780499 (6th Cir. 2007) (applying reasonableness review after *Booker*); *United States v. Hughes*, 401 F.3d 540, 546-47 (4th Cir. 2005) (same).

In particular, the Second Circuit, in "consider[ing] the scope of [the court's] review of a district court's decision not to resentence pursuant to" a limited remand, *Williams*, 475 F.3d at 471, concluded that it retained "authority to review for reasonableness both the procedure whereby the District Court decided not to resentence and the substance of the undisturbed sentence." *Id.*

Similarly, the Seventh Circuit held that a district court's decision not to modify its original sentence on post-*Booker* remand would be affirmed "against a plain-error challenge [only] provided that the sentence is reasonable. . . . [T]he mere reimposition of the original sentence does not insulate from appellate review under the new [*Booker*] standard." *Paladino*, 401 F.3d at 484.

Certiorari is warranted in this case to resolve this split among the federal circuits regarding the proper

scope of reasonableness review to be applied when the district court decides on post-*Booker* remand to adhere to its originally imposed sentence.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *BOOKER* AND *RITA*.

This Court's decision in *Booker* struck down the federal sentencing guidelines created by the Sentencing Reform Act of 1984 to the extent that these guidelines mandated the imposition of sentences based on facts found not by a jury, but by a judge. *Booker* severed the mandatory provisions of the sentencing guidelines to render the remaining sentencing provisions advisory. *Booker* further held that the courts of appeals must apply a "reasonableness" standard of review to sentences under the new regime. 543 U.S. at 260-61. This Court explained that such a reasonableness standard was practical and familiar to courts applying sentencing law. *Id.* at 262.

This Court further explained post-*Booker* reasonableness review in *Rita v. United States*, 127 S.Ct. 2456 (2007). *Rita* held that federal appellate courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated sentencing ranges. *Id.* at 2459. The Court emphasized that the presumption of reasonableness was not binding, *id.* at 2463, and that the courts of appeals would continue to determine the reasonableness of the district court's sentence, *id.* at 2464.

Despite the fact that this Court has required that an appellate court look to the reasonableness of the post-*Booker* sentence, the Ninth Circuit has inter-

preted "reasonableness" review in a manner that defies common sense understanding of the word and conflicts with this Court's precedent.

The Ninth Circuit in *Combs*, 470 F.3d at 1294, held that it would review a district court's decision to adhere to the original pre-*Booker* sentence only to determine whether the district court understood the full scope of its discretion after *Booker*. It would not inquire into whether the length of sentence was reasonable. It would not inquire into whether the appropriate factors were considered under 18 U.S.C. § 3553(a), which instructs the sentencing judge to consider, *inter alia*, offense and offender characteristics and whether the sentence is greater than necessary to comply with the purposes of sentencing. The Ninth Circuit applied *Combs* in this case and refused to apply any substantive reasonableness review, thus denying Mr. George any substantive appellate review of his sentence.

The Ninth Circuit's approach in this case conflicts with the plain language of this Court's decision in *Booker*, which expressly stated that reasonableness review will apply to all cases pending on appeal; it also conflicts with *Rita*'s articulation of a non-binding appellate presumption of reasonableness, which plainly implies that some sort of substantive reasonableness analysis must occur at the appellate level. Here, by looking only to whether the district court understood the full scope of its post-*Booker* discretion, the Ninth Circuit has abandoned any meaningful reasonableness review.

In addition, the Ninth Circuit in this case and in *Combs* has imposed a reasonableness review that differs for those defendants who challenged the reason-

ableness of their sentence on appeal in the first instance, as opposed to those defendants who did not raise such an initial challenge. This Court in *Booker* never made such a distinction. *See Combs*, 470 F.3d at 1299 (Berzon, J., dissenting) (noting that the *Combs* majority was drawing an unauthorized distinction between those who questioned the reasonableness of their sentences on appeal, and those, like Combs, who did not).

Certiorari is warranted in this case because the Ninth Circuit's decision below and in *Combs* not only has created an intercircuit split, but is also in conflict with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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